No. 80-2200

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD W. WYRICK,

Petitioner

v.

WILLIE WILLIAMS,

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

RICHARD BURKE
Assistant Public Defender

1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorneys for Respondent
Willie Williams

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Opinions Below

Willie Williams, a/k/a Willie J. Williams v. Donald W. Wyrick, No. 62879 (Mo. banc 1981), attached in State's petition as Appendix A

Constitutional and Statutory Provisions Involved

Respondents add to the statutory provisions cited by petitioner the following.

Section 556.041(1), RSMo 1978, reads in relevant part:

> Section 556.041. Limitations on conviction for multiple offenses. -- When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046;

Section 556.046.1(1), R.S.Mo. 1978, reads in relevant part:

> 556.046. Conviction of included offenses. -- 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

Summary of Argument

I

The decision of the Missouri Supreme Court does not conflict with applicable decisions of this Court because this Court has not decided the issue presented here.

II

The federal constitutional issue involved has been nullified by subsequent enactments of the Missouri General Assembly and by construction of those enactments by the Missouri Supreme Court.

Argument

I

Petitioner contends that the decision of the Missouri Supreme Court in Williams v. Wyrick, No. 62879 (Mo. banc 1981) holding that Respondent's conviction under Section 559.225 R.S.Mo. Supp. 1976 for armed criminal action violates the double jeopardy clause of the United States Constitution, Amendment V, conflicts with decisions of this Court. Principal reliance is placed on Albernaz v. United States, 450 U.S. _____ , 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The separate offenses of which Albernaz was convicted satisfied the test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), each requiring proof of a fact the other did not. Albernaz does not govern the situation presented in these

cases of simultaneous conviction for armed criminal action and the underlying felony necessary to be proved under the Missouri armed criminal action statute.

Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), although distinguishable to the extent that it involved multiple prosecutions, stands for the proposition that when a greater crime (in Harris, felony-murder) cannot be proved without proof of a lesser crime (the underlying felony), the two are the same offense for double jeopardy purposes.

In Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), it was decided that the Congressional intent was not to authorize consecutive sentences for felony-murder and the underlying felony of rape. Whalen did not reach the issue of whether Congress could constitutionally have authorized consecutive sentences.

Petitioner, in his "Questions Presented," cites Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). This makes too much of a memorandum decision dismissing the appeal for want of a substantial federal question. Such a decision breaks no new ground, but applies only to the "precise issues" and "particular facts" involved in the judgment appealed from. Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977). It intimates nothing with regard to Missouri law.

II

The issue on which petitioner seeks review is not "an important question of federal law which has not been, but should be, settled by this court . . ." Supreme Court Rule 17.1(c). It has, in fact, been rendered moot by subsequent enactments of the Missouri General Assembly.

In 1977, the Legislature enacted a new Criminal Code, Section 556.011 et seq., R.S.Mo. 1978, effective January 1, 1979. Two provisions of that Code are pertinent here. Section 556.041 forbids conviction of more than one offense arising out

of the same conduct if "(1) One offense is included in the other, as defined in section 556.046." The latter provides in relevant part:

> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . .

The Missouri Supreme Court has recently considered the impact of these provisions on the armed criminal action statute, now Section 571.015, R.S.Mo. 1978, reenacted as part of the same Criminal Code. In State ex rel. Westfall v. Ruddy, _____ S.W.2d _____, No. 61958 (Mo. banc 1981), the court held that conviction of both armed criminal action and the underlying felony was forbidden by the above-cited statutes. The prosecution henceforward may charge an accused with both offenses and may submit both to the jury, but only in the alternative.

With Ruddy, the federal double jeopardy issue has been rendered moot. Since this Court does not review a state supreme court's construction of a state statute, Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), a grant of certiorari would serve no purpose.

Respondents submit that the federal question in these cases is untimely presented and of no such significance as to merit review on writ of certiorari.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

RICHARD BURKE
Assistant Public Defender

1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

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Willie Williams

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Willie Williams moves this court for an order permitting him to proceed in this court in forma pauperis, pursuant to Supreme Court Rule 46, as party respondent in the above-captioned cause. Affidavit in support of this motion are attached hereto.

Respondent states that he moved for and was granted leave to appeal as a poor person by the Circuit Court of the City of St. Louis, Missouri. He subsequently was and is represented by the Public Defender of that city.

Respectfully submitted,

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

RICHARD BURKE

Assistant Public Defender
1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorneys for Respondent
Willie Williams

Subscribed and sworn to before me this 19 day of January, 1982.

WILLIAM C. FRIEDRICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES MAY 28, 1985
CITY OF ST. LOUIS

Notary Public

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION

TO PROCEED IN FORMA PAUPERIS

I, Willie Williams, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you present employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: No 12/77 $125.00 wk.

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: No

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer: No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer: No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: N/A

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Willie James Williams

JOSEPH W. DOWNEY
Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Henry Robertson

HENRY ROBERTSON
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Subscribed and sworn to before me this 19 day of Jan, 1982.

William C. Friedrich

Notary Public

WILLIAM C. FRIEDRICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JAN. 28, 1985
CITY OF ST. LOUIS

FH

(Form 19 L5,51)

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PROOF OF MAILING - AFFIDAVIT

I, Joseph W. Downey, one of the attorneys for Respondent Willie Williams, and a member of the Bar of the Supreme Court of the United States, hereby certify that the enclosed Brief in Opposition to Petition for Certiorari was placed in a mailbox in this building, 1320 Market Street, St. Louis, Mo., 63103, first class postage prepaid, on January 19, 1982, addressed to the Clerk of the Supreme Court, 1 First St., N.E., Washington, D.C. 20543, within the time allowed for filing and that a copy was mailed at the same time and place to Philip M. Koppe and Steven Garrett, Assistant Attorneys General, P.O. Box 899, Jefferson City, Mo. 65102.

JOSEPH W. DOWNEY
1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorney for Respondent
Willie Williams

Subscribed and sworn to before me this 19 day of January, 1982.

Notary Public

WILLIAM C. FRIEDRICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JAN. 28, 1982
CITY OF ST. LOUIS